SUPREME COURT, U. S.

JUN 15 1967

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 252

EFRAIN T. SUAREZ,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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STATE OF FLORIDA,

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

Petitioner prays that a writ of certiorari issue to the District Court of Appeal of Florida, Third District, to review the final judgment entered in the above entitled case on June 29, 1966, for which a re-hearing was denied September 30, 1966, and to which a Petition for Writ of Certroiari to the Florida Supreme Court was denied January 17, 1967, and amended February 14, 1967.

CITATIONS TO OPINIONS BELOW

The judgment of the Criminal Court of Record of Dade County, Florida, is unreported and appears in the Record at pp. 516-517.

The decision of the District Court of Appeals of Florida, Third District, is officially reported at 189 So.2d 656 and is printed in Appendix A hereto.

The Supreme Court of Florida did not issue an opinion. Its Order denying Petition for a Writ of Certiorari, and its Order denying a Re-hearing on the Petition for Writ of Certiorari on jurisdictional grounds is printed in Appendix B and C hereto.

JURISDICTION

The decision of the District Court of Appeal of Florida, Third District, was entered on June 29, 1966 (Appendix A hereto). The Order of the Supreme Court of Florida denying the Petition for Writ of Certiorari was entered on January 17, 1967 (Appendix B hereto), and amended February 14, 1967 (Appendix C hereto). An Order Extending Time to File Petition for Writ of Certiorari was entered by Mr. Justice Black on May 15, 1967, extending Petitioner's time for filing to and including June 16, 1967 (Appendix D hereto).

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3) in that a right, privilege, or immunity is claimed under the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether police officers, without authority of warrant, may by subterfuge place one of their number inside a building and use the fact of her presence in a position of possible bodily harm to justify forcible entry to the premises, in violation of the guarantees of the Fourth Amendment to the Constitution of the United States, which guarantees are made applicable to the States by the Fourteenth Amendment to the Constitution of the United States?

2. Whether, consistent with the guarantees of the Fourth Amendment to the Constitution of the United States, and Section 901.19 (1), Florida Statutes, a police officer may kick open the door to gain entry to a building where a person to be arrested is believed to be without first announcing his purpose in gaining entrance?

3. Whether, consistent with the "reasonable search" provisions of the Fourth Amendment to the Constitution of the United States and Section 22 of the Declaration of Rights of the Constitution of Florida, police officers, embarking on a search of the premises, may continue to forcibly and destructively gain entrance to interior rooms of a building wherein they have made an arrest without first announcing their authority and purpose and being denied entry thereof?

4. Whether, consistent with the guarantees against self-incrimination of the Fifth Amendment to the Constitution of the United States and Section 12 of the Declaration of Rights of the Constitution of Florida, evidence other than fruits of a crime, instrumentalities for commission of a crime, or contraband, may be confiscated by arresting officers and introduced against the accused over his objection when such evidence is obtained as a result of unlawful entry and unreasonable search of the premises?

5. Whether, consistent with the right of persons to be secure against unreasonable seizure guaranteed by the Fourth Amendment to the Constitution of the United States, and Section 22 of the Declaration of Rights of the Constitution of Florida, there was probable cause for officers without authority of warrant to arrest Petitioner inside his place of business when they did not know or have reason to believe he was within the premises at the time they forcibly gained entry to same?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or af-

firmation, and particularly describing the place to be searched, and the persons or things to be seized.

U. S. Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Constitution, Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any within its jurisdiction the equal protection of the laws.

Constitution of the State of Florida, Declaration of Rights, Section 12, as found in Vol. 3, Official Florida Statutes, 1965, at Page 3792:

Double jeopardy; self-incrimination; eminent domain; right to work.—No person shall be subject to be twice put in jeopardy for the same offense, nor compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken without just compensation. The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union, or labor organization; provided that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer.

Constitution of the State of Florida, Declaration of Rights, Section 22, as found in Vol. 3, Official Florida Statutes, 1965, at Page 3793:

Searches and seizures. — The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches, shall not be violated, and no warrants issued, but upon probable cause, supported by oath or affirmation particularly describing the place or places to be searched and the person or persons or thing or things to be seized.

Section 901.19 (1), Florida Statutes, 1965, as found in Vol. 2, Official Florida Statutes, 1965, at page 3640:

Right of officer to break into building.—(1) An officer, in order to make an arrest either by virtue of a warrant, or when authorized to make such arrest for a felony without a warrant, may break open a door or window of any build-

ing in which the person to be arrested is or is reasonably believed to be, if he is refused admittance after he has announced his authority and purpose.

STATEMENT OF THE CASE

In November, 1963, members of the State Attorney's Office of Dade County, Florida, and the Assistant Chief of Police of the City of Miami decided they would "try to make a case that would hold up" against a Dr. Ayala whom them suspected of performing illegal abortions in violation of Section 797.01, Florida Statutes, at a building located in the City of Miami known as the Ayala Clinic (R. 35, 50).

Two policewomen from Tampa, Florida, Barbara Williams and Myrtle Ellison, were enlisted to assist in the operation (R. 51-52). A plan was devised by the authorities whereby the policewomen would make arrangements for an abortion. Should they be successful, they were to go to the clinic, proceed with preparations for the abortion, and pay the doctor with money marked for this purpose. After having paid the money over, Policewoman Ellison was to exit from the building and leave the door open behind her (R. 35). This was to signal officers waiting outside to enter the building (R. 52).

If anyone attempted to perform any act toward committing an abortion, Policewoman Williams was to place that person under arrest (R. 73). She was not pregnant, nor had she any intention of allowing an abortion to be committed upon her (R. 75-76, 169).

Pursuant to the plan, Policewoman Williams called

the Ayala Clinic on January 2, 1964, and spoke with one who identified himself as Dr. Ayala (R. 51, 67), and made an appointment for the following morning (R. 12).

On January 3, 1964, certain officers from the City of Miami, the two policewomen, and an investigator from the State Attorney's Office went to the vicinity of the Ayala Clinic (R. 4-5). The two women entered the building pursuant to plan (R. 6). Policewoman Williams consulted with a man later identified as the Petitioner, Efrain T. Suarez, who conducted a pelvic examination upon her to determine whether or not she was pregnant (R. 163). This pelvic examination allegedly occurred in one of the interior rooms of the clinic (R. 166). Policewoman Ellison waited in an adjoining interior room (R. 77-79). At no time did Petitioner make any effort to administer medication or drugs, nor did he attempt to use any instrument upon the policewoman (R. 173).

After the examination, the procedure which would be followed was explained to Policewoman Williams (R. 164). Policewoman Williams obtained the money from Policewoman Ellison and paid it over to the Petitioner (R. 163). Policewoman Ellison then left the building (R. 164). The two women had been in the building for twenty to twenty-five minutes (R. 6).

Policewoman Ellison came out and told waiting officers that the money had been passed and that Policewoman Williams was supposed "to get a needle" (R. 8). The officers then entered through an open door into an outer office. There they were confronted by a closed door. One of the officers announced: "Police officers. State Attorney's Office. Open the door." (R. 8). They waited

fifteen to twenty seconds (R. 9). Then they kicked the door down (R. 8).

Police officers had gone to the clinic to arrest anyone on the premises for conspiracy to commit an abortion and for attempted abortion (R. 11).

The police officers knew in advance that an attempt would be made to give Policewoman Williams an injection (R. 33). They also knew in advance that if anyone made any act toward committing an abortion upon her, Policewoman Williams was to place them under arrest (R. 73).

Although there was sufficient time in which to do so (R. 14), the officers did not attempt to secure a warrant for the arrest of anyone or a warrant to search the premises (R. 47, 58). No announcement of purpose was made prior to the forced entry of the premises (R. 177), nor were the officers refused entry to the premises (R. 9).

Passing through the broken door, officers proceeded down a hallway to another door. No announcement of identity, authority, or of purpose, or demand for entry was made at this door, nor was admittance refused. The officers kicked this door down (R. 177). Proceeding down the hallway, officers came to another door which was kicked down without any announcement of authority, purpose, or demand for entry; nor was admittance refused (R. 11, 15). Altogether, approximately five doors were kicked down in this manner (R. 212).

Passing further along the hall, officers met the Petitioner, who was coming toward them in the direction of the building entrance. They immediately placed him

under arrest for conspiracy to commit an abortion, and attempted abortion on Policewoman Williams (R. 15, 16). The officers had not seen nor spoken to Policewoman Williams until after the Petitioner had been arrested (R. 14-15).

An Information was filed alleging conspiracy to commit abortion and attempted abortion (R. 450-454). A Motion to Suppress the Evidence was denied by the trial court (R. 98). Petitioner was found guilty on conspiracy to commit abortion and attempted abortion upon Policewoman Williams (R. 514). A motion for a new trial was denied (R. 526). Assignment of error based on the court's denial of the motion to suppress the evidence was filed (R. 529), and the District Court of Appeals of Florida, Third District, was asked to decide the issue as to whether the evidence should have been suppressed (Appendix 2). By a unanimous decision, the District Court of Appeals reversed the conviction of conspiracy to commit an abortion (Appendix 12).

The Opinion declared that the search and seizure and subsequent admission of the evidence was legal. Refusal of the officers to announce their purpose prior to forcibly entering the premises was deemed to have come within an exception to Sec. 901.09 (1), Florida Statutes, *supra*, as set forth by the Florida Supreme Court in *Benefield* v. *State*, 160 So.2d 706 (Appendix 22-23). Petition for Rehearing was denied September 20, 1966.

The Opinion of the majority of the District Court was predicated upon the arresting officers' "good faith belief" that Policewoman Williams was in imminent peril of bodily harm (Appendix 12). Petitioner respectfully

submits that this finding is not supported in the testimony, but rather that the contrary is indicated, as the minority Opinion states (Appendix 8). The finding of the District Court is therefore in conflict with statute and prior decision of the Florida Supreme Court, and with numerous decisions of this Honorable Court.

In affirming Petitioner's conviction of attempt to commit an abortion upon Policewoman Williams, which was arrived at in the trial court through admission of evidence gained from an illegal search and seizure, the District Court of Appeals of Florida, Third District, committed error.

Petition for Writ of Certiorari was denied by the Florida Supreme Court on jurisdictional grounds in its order dated January 17, 1967, and a Petition for Rehearing was denied on February 14, 1967.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

Petitioner relies upon the following reasons why the petition for writ of certiorari should be granted in this case:

Important and substantial issues of federal constitutional law are here presented. They involve the destructive effect of certain law enforcement methods on the basic guarantees of the Fourth Amendment, and the consequent damage to rights and privileges vouchsafed by the Fifth Amendment. They involve the danger which a convenient exception poses to an oft-defended and well established rule.

A requisite to forcible entry of a premises for the purpose of making an arrest is that officers identify themselves, their authority, their purpose, and be refused admittance. This requirement is found in Florida and federal statutes and case law alike. Section 901.09 (1), Florida Statutes, 1965; 18 U.S.C. Sec. 3109; *Benefield* v. *State*, 160 So.2d 706 (1964); *Miller* v. *United States*, (1958) 357 U.S. 301, 78 S.Ct. 1190.

Petitioner respectfully submits that testimony throughout clearly demonstrates that arresting officers consistently failed to announce their purpose in demanding admission.

The State does not contend that the statute was complied with. Counsel for the State made no effort to elicit testimony concerning announcement of purpose even though he was permitted to cross-examine and lead his witness.

In *United States* v. *Barrow*, 212 F.Supp. 837 (D.C. E.D. Pa. 1962), government agents went to a premises to execute arrest warrants. They passed through two doors before coming to a locked door. They announced their identity to the door. They did not announce purpose until entry had been gained by breaking the door. In reversing a conviction, the Court stated at Page 843:

> * * * From their testimony it is unmistakable that no announcement of purpose was made until after the third door was broken down and Agent Frohbose had entered the room. * * *

The Court also observed:

> * * * We think it of extreme significance that government counsel, an able trial lawyer and one more experienced than most in the criminal field, although permitted to cross-examine and lead the government agents who testified, made no attempt to elicit from either Dean or Bass an announcement of purpose before the door was broken down. * * *

The Florida Supreme Court interpreted the state statute in *Benefield* v. *State*, *supra*, laying down the same guidelines as those which govern federal agents.

> * * * When an officer is authorized to make an arrest in any building, he should first approach the entrance to the building. He should then knock on the door, and announce his name and authority * * * and what his purpose is in being there. * * * If he is refused admission * * * he may then break open a door or a window to gain admission to the building and make the arrest. * * *
>
> * * * *
>
> The law forbids the law enforcement officers of the state or of the United States to enter before knocking at the door, giving his name and the purpose of his call. * * *

In *Miller* v. *United States*, (1958) 357 U.S. 301, this Honorable Court observed:

> * * * Whatever the circumstances under which breaking a door to arrest for a felony might be lawful, however, the breaking was unlawful where the officer failed first to state his authority and purpose for demanding admission. * * *
>
> * * * *
>
> The rule seems to require notice in the form of an express announcement by officers of their purpose for demanding admission. The burden of making an express announcement is certainly slight. A few more words by the officers would have satisfied the requirements in this case.
>
> * * *

Petitioner respectfully asks why the officers should not have announced their purpose as demanded by statute and prevailing case law? The answer can only be (a) that they forgot to, that they carelessly omitted a statutory requirement, or (b) that they feared that by announcing their purpose they would somehow add to the peril of Policewoman Williams.

If arresting officers omitted an established requirement for no good reason, then their actions in breaking down the door would, it is submitted, be clearly unlawful. In *Miller* v. *United States*, *supra*, this Honorable Court warned against tolerating short cuts to law enforcement since such methods impair its enduring effectiveness. Petitioner respectfully submits that condoning the negligent omission of a statutory requirement is an example of tolerance of short-cut methods.

The latter reason, that their announcement would add to her peril, falls before the fact that the officers did pause before entering. They knocked, announced their identity, and demanded entry before kicking the door down. Judicial recognition of the relevancy of such action is found in *United States* v. *Barrow*, 212 F.Supp. 837 (D.C. E.D. Pa. 1962) at Page 847:

> Secondly, there was in fact an announcement of identity. Obviously, if the agents had a bona fide belief that announcement would result in peril, that peril would come from the fact and not the nature of the announcement. The fact that some announcement was made dispels any doubt that the agents had no bona fide apprehension of peril if an announcement were made.

Petitioner respectfully submits that the entry, from the standpoint of failure to announce purpose, was illegal.

But perhaps the most insidious danger to Fourth Amendment rights of the people to be secure from unreasonable search and seizure is the Florida District Court of Appeal's apparent willingness to allow an exception to dominate the rule. The controlling factor in the majority Opinion seemed to be that officers had a "bona fide belief" that Policewoman Williams was in imminent peril of bodily harm (Appendix 12). This is based upon testimony that officers rushed the building to prevent physical harm from befalling her (R. 45). Yet, Petitioner respectfully submits that this testimony is not consistent with the following:

(1) An element of risk is part and parcel of a police officer's job.

(2) Officers knew in advance what the risk factor was; Policewoman Williams willingly consented to accept that risk (R. 67-76).

(3) As a result of her telephone conversation with "Dr. Ayala", Policewoman Williams was aware that an injection, or an attempted injection, could be anticipated; she discussed this with arresting officers prior to the raid (R. 33).

Testimony of the arresting officer as found in the Record, pp. 32-33, is as follows:

Q (By the State) And did you also have conversation with any police personnel at that time?
A At the time we arrested Suarez?

Q No, at the time that you had the meeting and prior to the arrest and the planning?
A Yes, we had a conversation— I had a conversation with Barbara Williams and other parties.

Q What did she tell you?
A Barbara advised me that she had made an appointment with Dr. Ayala according to who she talked to and that she was supposed to be over at the clinic at 8:00 o'clock on the morning of January 3rd, and to bring with her a thousand dollars, and that she would be there for a period of an hour or two, and would get a needle, and it would be all over, and she could leave in a couple of hours.

(4) Should an attempt have been made to administer an injection or in any manner to commit an act toward an abortion, Policewoman Williams was instructed to place the actor under arrest. The arresting officers were aware of this (R. 73).

So, from the beginning the officers were aware of the element of possible risk, that an attempt to "use a needle" would be made, and that any act committed toward the abortion would prompt Policewoman Williams to effect an arrest. Petitioner respectfully submits that under these circumstances the announcement by Policewoman Ellison that her sister officer was to get "a needle" could not have spurred the sudden, urgent concern that she was in imminent peril of bodily harm as is contemplated by the exception to the rule against unannounced forcible entry to effect an arrest.

In ruling that this case fitted within the exception, the District Court of Appeal of Florida, in effect, sanctioned a convenient excuse for police to utilize for the purpose of violating a state statute, rights under the Florida Constitution, and the guarantees of the Fourth and Fifth Amendments to the United States Constitution.

If this decision is not reviewed, it will open up a broadening avenue of opportunity for law enforcement officers to avoid procedures demanded by the Constitution of the United States.

No longer will persons or premises be safe from unreasonable search and seizure when officers may create their own situation of emergency and plead it as an ex-

cuse to kick down doors to gain immediate entry to a premises.

The Florida District Court of Appeal refused to follow Federal courts on this point. Federal concern was expressed clearly in *Accarino* v. *United States*, 179 F.2d 456 (D.C. 1949) and *McKnight* v. *United States*, 183 F.2d 977 (D.C. 1950).

In *Accarino*, the government contended that exceptional circumstances of emergency justified the arrest and search without a warrant. The court concluded at page 464:

> * * * If thereafter there was a semblance of emergency requiring the breaking of the door, it was created by the officers.

And in *McKnight*, the court stated at page 978:

> * * * [T]here was no necessity to break open doors; or what comes to the same thing for legal purposes, none but what the officers themselves had created. * * * Neither policemen nor private citizens can justify breaking into a house, or other violence, by deliberately creating an alleged necessity for it. * * *

In the case at bar, police officers not only created the situation that existed, but they did it deliberately, intentionally, and with full knowledge of the procedure that was to be followed. Their purpose was to fabricate a necessity for breaking down the door to enter at the optimum moment to effect an arrest of persons or persons unknown.

Their plan was nothing more nor less than a "police strategem" such as the Court roundly condemns in *McKnight* and *Accarino.*

As the minority opinion of the District Court of Appeals found, there was no "valid reason" to justify a belief that Policewoman Williams was in imminent peril of bodily harm.

Therefore, Petitioner respectfully submits that there was no justifiable reason for omitting the requirement of announcement of purpose of the demanded entry. Thus, the entry was illegal.

In finding that the officers had "good faith belief" that Policewoman Williams was in imminent peril of bodily harm, and that this was sufficient reason for their forcible entry to the premises without conforming to the requirements of statute, Petitioner respectfully submits that the District Court of Appeal of Florida, Third District, decided a federal question of substance in a way probably not in accord with applicable decisions of this Court. That opinion is therefore subject to review by this Honorable Court on a writ of certiorari.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition For A Writ Of Certiorari was mailed, first class, postage prepaid to the Honorable Earl Faircloth, Esquire, Attorney General of the State of Florida and Arden M. Siegendorf, Assistant Attorney General of the State of Florida, State Office Building, 1350 N. W. 12th Avenue, Miami, Florida, Attorneys for Respondent, State of Florida, this _____ day of June, 1967.

_____

Angus M. Stephens, Jr.